ATTORNEY FOR APPELLANT:

MICHAEL S. GREENE
Elkhart, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MARLON M. BANKS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0609-CR-442
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable David C. Bonfiglio, Judge
Cause No. 20D02-0504-FC-68

May 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Marlon M. Banks appeals his sentence for twelve forgery convictions. We affirm.

Issue

Banks raises one issue, which we restate as whether the trial court erred in finding that the twelve counts of forgery for which he was charged and convicted constituted five episodes of criminal conduct.[1]

Facts and Procedural History

Between March 12, 2002, and October 23, 2003, Banks used his computer to print fake payroll checks using various actual and phony company names. Banks made the fake checks out to different individuals whom he had recruited and who received a monetary payment and sometimes drugs in return for cashing the fake checks. The individuals had no knowledge of each other, and on only a few occasions were the checks cashed at the same institution.

On April 1, 2005, the State charged Banks with twelve counts of class C felony forgery.[2] Appellant's App. at 22. Counts 1-5 related to five checks that were made out to Max House in amounts ranging from $300 to $457 that were cashed on March 13, 2002,

[1] Banks filed a pro se reply brief. This Court's docket, however, does not show that Banks' attorney has withdrawn his appearance. Banks is represented by counsel, and he does not have the right to hybrid representation. *See Underwood v. State*, 722 N.E.2d 828, 832 (Ind. 2000) (stating that trial court is not required to respond to both defendant and his or her counsel because defendant is not entitled to hybrid representation). We therefore decline to address his pro se reply brief. *See Snover v. State*, 837 N.E.2d 1042, 1045 n.3 (Ind. Ct. App. 2005) (declining to address defendant's pro se motion for sentence transcripts).

[2] Ind. Code § 35-43-5-2.

March 15, 2002, March 22, 2002,[3] and April 4, 2002. *Id*. at 22-26. Counts 6 and 7 related to two checks that were made out to Mary Lay in the amounts of $985 and $753 that were cashed on April 10, 2003, and April 11, 2003. *Id*. at 27-28. Counts 8 and 9 related to two checks that were made out to Robert Brown, Jr., in the amounts of $450 and $475 that were both cashed on March 22, 2002. *Id*. at 29-30. Count 10 related to one check that was made out to Elesta Wilson for $1200 that was cashed on July 14, 2003. *Id*. at 31. Count 11 related to one check that was made out to Donald Pillars for $750 that was cashed on April 23, 2003. *Id*. at 32. Finally, count 12 related to one check that was made out to Deborah Latendresse for $520 that was cashed on October 23, 2003. *Id*. at 33.

On September 14, 2005, Banks filed a motion for severance of counts pursuant to Indiana Code Section 35-34-1-11(a).[4] On September 27, 2005, the State filed an objection to Banks' motion, arguing that the "evidence presented at trial will demonstrate that for each charged offense, [Banks] had a similar modus operandi and motive which will connect the offenses as part of a single scheme or plan." *Id*. at 49. On October 5, 2005, the trial court denied Banks' motion. On February 28, 2006, Banks filed a second motion for severance,

---

[3] Two checks were cashed on March 22, 2002.

[4] Indiana Code Section 35-34-1-11(a) provides,

> Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:
>
> (1) the number of offenses charged;
>
> (2) the complexity of the evidence to be offered; and
>
> (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

which the trial court denied.

On March 2, 2006, a jury found Banks guilty as charged. On April 17, 2006, a sentencing hearing was held. The trial court found that the twelve counts of forgery constituted five episodes of criminal conduct: (1) an episode consisting of the checks made out to House and Brown in March and April 2002, counts 1-5, 8 and 9; (2) an episode consisting of the checks made out to Lay in April 2003, counts 6-7; (3) an episode consisting of the check made out to Wilson in July 2003, count 10; (4) an episode consisting of the check made out to Pillars in April 2003, count 11; and (5) an episode consisting of the check made out to Latendresse in October 2003, count 12. Tr. at 385-86. The trial court found no mitigating factors and one aggravating factor, Banks' criminal history. The trial court then sentenced Banks as shown below:

Counts 1-5:	two years each, served consecutively;
Counts 8-9:	five years each, served consecutive to each other and concurrent with counts 1-5;
Counts 6-7:	five years with one year suspended each, served consecutive to each other and concurrent with counts 1-5;
Count 10:	eight years with four years suspended, served consecutive to 6-7;
Count 11:	eight years with four years suspended, served consecutive to 10; and
Count 12:	eight years with four years suspended, served consecutive to 11.

Appellant's App. at 212. Thus, Banks received an aggregate sentence of forty-four years; thirty years executed with fourteen years suspended to probation. Banks now appeals.

Discussion and Decision

Banks argues that the twelve instances of check forgery constitute a single episode of criminal conduct, and therefore the maximum sentence he can receive is ten years, the

advisory sentence for a class B felony. Banks' claim rests upon Indiana Code Section 35-50-1-2(c), which states in relevant part:

> The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 and IC 35-50-2-10, to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

An "episode of criminal conduct" is defined as "offenses or a connected series of offenses that are closely related in time, place, and circumstance." Ind. Code § 35-50-1-2(b).

In *Tedlock v. State*, 656 N.E.2d 273, 276 (Ind. Ct. App. 1995), another panel of this Court explored the meaning of "episode of criminal conduct" and observed that the "'singleness of a criminal episode should be based on whether the alleged conduct was so closely related in time, place and circumstances that a complete account of one charge cannot be related without referring to details of the other charge.'" Id. at 276 (quoting *State v. Ferraro*, 800 P.2d 623, 628 (Haw. Ct. App. 1990)). Recently, our supreme court observed that opinions subsequent to *Tedlock* have overemphasized the significance of the "complete account of one charge" language as an essential factor in determining whether offenses constitute an episode of criminal conduct. *Reed v. State,* 856 N.E.2d 1189, 1199 (Ind. 2006). Our supreme court explained,

> [T]his is a bit of an overstatement. We are of the view that although the ability to recount each charge without referring to the other can provide additional guidance on the question of whether a defendant's conduct constitutes an episode of criminal conduct, it is not a critical ingredient in resolving the question. Rather, the statute speaks in less absolute terms: "a connected series of offenses that are closely connected in time, place, and circumstance." I.C.

> § 35-50-1-2(b). And as we have observed, "*Tedlock* emphasizes the timing of the offenses" and "refers to the 'simultaneous' and 'contemporaneous' nature of the crimes which would constitute a single episode of criminal conduct." *Smith v. Stat*e, 770 N.E.2d 290, 294 (Ind. 2002) (citing *Tedlock*, 656 N.E.2d at 276).

Id. at 1200.

Here, Banks argues, in essence, that because the trial court found his offenses sufficiently similar to support its denial of his motion for severance, the counts must be a single episode. Banks asserts, "If all of the checks were part of the same scheme for forging checks, it is apparent that a complete account of one charge of check forging cannot be related without referring to the other eleven check forging charges." Appellant's Br. at 6. However, as we have just noted, our supreme court has recently clarified that the ability to recount each charge without referring to the other "is not a critical ingredient" in determining whether the charges constitute a single episode. *Reed*, 856 N.E.2d at 1200. Moreover, Banks' suggestion that a criminal scheme is synonymous with a single criminal episode is inconsistent with Indiana case law. In *Tedlock*, we concluded that four frauds committed against four different victims over a period of two years did not constitute a "single episode" pursuant to Indiana Code Section 35-50-1-2(b). "On its facts, therefore, it is plain that *Tedlock* involved a common criminal scheme, but it clearly involved multiple 'episodes' that were not 'closely connected in time and place.'" *Harris v. State*, 861 N.E.2d 1182, 1188 (Ind. 2007).

Similarly, Banks' multiple instances of check forgery evince a common plan or scheme, but the instances are not so connected in time, place, and circumstance as to be considered a single criminal episode. Indeed, the checks were made out to six different

individuals over a two-year period. The trial court appropriately considered how the instances of forgery were connected by noting whom the checks were made out to and when the checks were cashed. Accordingly, we conclude that the trial court did not err in finding that the twelve counts of forgery consisted of at least five criminal episodes. *See Smith v. State*, 770 N.E.2d 290, 294 (Ind. 2002) (concluding that stolen checks that were deposited at six different institutions on the same day but at different times were separate criminal episodes); *see also Farris v. State*, 787 N.E.2d 979, 985 (Ind. Ct. App. 2003) (concluding that forgeries committed throughout the country were not one criminal episode even though committed under the same name).[5] Having found no grounds for reversal, we affirm Banks' sentence.

Affirmed.

BAKER, C. J., and FRIEDLANDER, J., concur.

[5] While we acknowledge that *Smith* and *Farris* were decided before *Reed*, we believe their results would have been the same under *Reed*.